



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 4, 1992

Mr. James R. Raup
McGinnis, Lochridge & Kilgore
1300 Capitol Center
919 Congress Avenue
Austin, Texas 78701

OR92-84

Dear Mr. Raup:

You advise that the Austin Independent School District (AISD) received two written requests for information pertaining to the removal of two individuals from the district's substitute teacher list. You ask whether the requested information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 13635.

The first request was submitted by an attorney representing Mr. Brian Ditter, one of the individuals whose name was removed from the substitute teacher list. You note that Mr. Ditter's attorney asks that the district compile particular information -- specifically, a list of the complaints against Mr. Ditter, the date and place of occurrence, the party making the complaint, and a list of any witnesses to the conduct forming the basis of the complaint. The Open Records Act does not require a governmental body to prepare new information in response to a request from a member of the public. *Economic Opportunities Dev. Corp. of San Antonio v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dism'd); Attorney General Opinion H-90 (1973). By the same token, however, a governmental body is under a duty to make a good faith effort to relate the specific terms of the request to information it does possess. Open Records Decision No. 561 (1990) at 8. The governmental body may be required under the act to compile some information by means that are not excessively obtrusive or disruptive of the governmental body's operations. See Attorney General Opinion JM-672 (1987) (minimal computer searches and compilation of public information required). If the AISD cannot reasonably comply with the request by providing access to information in its possession, it is not required to prepare new information in response to this

request. See Open Records Decision No. 452 (1986) at 3. We will assume for purposes of this decision that the AISD may reasonably comply with the request.

The second request for information was submitted by Ms. Kathryn Kirk, the second individual whose name was removed from the list. Ms. Kirk requests access to "all written papers in [AISD] files which have any connection to my removal from the AISD substitute teachers list including documents giving the reasons for such removal." You claim that the information requested by Ms. Kirk and Mr. Ditter is excepted by sections 3(a)(3) and 3(a)(11) of the Open Records Act.¹

Section 3(a)(3) excepts the following from required public disclosure:

information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political subdivision is, or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence of his office or employment, is or may be a party, that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection.

Information may be excepted from disclosure if litigation is pending or reasonably anticipated and the information relates to the pending or anticipated litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.). When the attorney for the governmental body determines that information relates to litigation, this office's review will be confined to the relation of the subject matter of the information to the subject matter of the litigation. Open Records Decision No. 551 (1990).

You believe that the requested information should be excepted because both of the individuals involved are represented by attorneys. However, the single fact that a request for information is made by an attorney on behalf of an individual is

¹You have submitted for our review several documents, many of which appear not to correspond to the information requested by Mr. Ditter and Ms. Kirk. Specifically, you have offered certain medical forms, academic credentials, and federal income tax forms supplied by the requestors to the district. These documents do not on their face relate to the reasons the individuals' names were removed from the substitute teacher list. Accordingly, it is unnecessary to consider whether the district is required to release these documents in response to the current requests for information.

not sufficient to invoke section 3(a)(3). Open Records Decision No. 361 (1983). We think the same is true of requests submitted by persons who happen to be represented by attorneys. The attorney representing Ms. Kirk has advised this office that Ms. Kirk is not contemplating litigation. Because you have not otherwise established that the information requested by Ms. Kirk relates to pending or reasonably anticipated litigation to which the school district is or will be a party, the information she requests may not be withheld pursuant to section 3(a)(3).

The attorney representing Mr. Ditter stated that his request was for the purpose of exercising Mr. Ditter's right to appeal the decision to remove him from the list of substitute teachers. The information requested by Mr. Ditter may be withheld if the appeal he is pursuing may be considered litigation. This office considers contested cases under the Administrative Procedure and Texas Register Act, V.T.C.S. article 6252-13, to constitute litigation for purposes of section 3(a)(3), but questions remain whether administrative proceedings not subject to the act may be considered litigation under this exception. Open Records Decision No. 588 (1991).

The term "litigation" ordinarily implies proceedings within the judicial or executive branches of government. *See State v. Thomas*, 766 S.W.2d 217 (Tex. 1989); *Davis v. First Nat'l Bank of Waco*, 161 S.W.2d 467, 472 (Tex. 1942); *see also* Garner, A DICTIONARY OF MODERN LEGAL USAGE 344 (1987) ("litigation" properly refers to the *process* of carrying on a suit in law or equity, rather than the proceeding itself). Section 3(a)(3) has been applied by this office outside the judicial branch of government to include only quasi-judicial proceedings of administrative agencies in the executive branch of government. *See* Open Records Decision Nos. 556 (1990); 474 (1987); 436 (1986); 368 (1983); 301 (1982).

We are informed by the Executive Director of the Division of Personnel of the AISD that the district has not adopted any formal policies governing the appeal of a decision to remove an individual's name from the substitute teacher list. Although it appears that substitute teachers are subjected to many of the same application and screening requirements as regular teachers, we are told that substitutes are not considered permanent employees of the AISD and are not parties to any teaching contract with the district. The district does not guarantee employment once an individual's name has been placed on the substitute list. According to the executive director, the "appeal" referred to in the documents submitted for our inspection consists of informal meetings with officials in the

personnel division. There are no policies or regulations governing the conduct of these appeals.

Given the informal and unstructured nature of the appeal in question, we do not believe that the appeal may be characterized as "litigation" for purposes of section 3(a)(3) of the Open Records Act. *Compare* Open Records Decision Nos. 556 (1990); 474 (1987); 436 (1986); 368 (1983); 301 (1982). The district therefore may not withhold the information on these grounds.

Section 3(a)(11) excepts "interagency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency." Interagency or intra-agency information may be withheld pursuant to this exception if it consists of advice, opinion, or recommendation that is used in the deliberative process of the governmental body. Open Records Decision No. 574 (1990). Facts and written observations of facts may not be withheld under section 3(a)(11) when such information is separable from advice, opinion, or recommendation. *Id.*

The information submitted for our inspection corresponding to Mr. Ditter's and Ms. Kirk's requests consists of intra-agency communications concerning complaints against both individuals. This information largely reports facts or observations of fact that may not be withheld pursuant to section 3(a)(11). Statements which reflect opinion have been marked and may be withheld from disclosure.

To summarize, we conclude that with the exception of statements excepted under section 3(a)(11), the AISD must release the materials submitted for our inspection which correspond to the terms of the specific requests for information.²

²Section 3B of the Open Records Act provides that

[a] person or the authorized representative of a person has, beyond the right of the general public, a special right to and to copies of any records held by a governmental body that contain information relating to the person that is protected from public disclosure by laws intended to protect that person's privacy interests. The fact that information is deemed confidential by privacy principles under this Act does not grant the governmental body the right to deny access to the person, or the person's representative, to whom the information relates. However, laws and provisions of this Act, other than ones intended to protect that person's privacy interests, may still form the basis for denial of access to the person or the person's representative to whom the information relates.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR92-84.

Yours very truly,



Steve Aragon
Assistant Attorney General
Opinion Committee

SA/mc

Enclosures: Marked documents

Ref.: ID# 13635, 13785

cc: Mr. J. B. Kraft
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Ms. Kathryn Kirk
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(footnote continued)

V.T.C.S. art. 6252-17a, § 3B. Certain information in the files, which we have marked, is protected by common law privacy and must be withheld from public disclosure under section 3(a)(1), but may not be withheld from the individual to whom it relates under section 3B.